New York Law Journal

Tuesday, October 25, 2005

HEADLINE: **Trial Advocacy, Who's Up First? Issues Related to Order of Summation**

BYLINE: **Ben B. Rubinowitz** and Evan Torgan

BODY:

The order of summation is a continuous source of concern for trial lawyers. Although the attorney who defends a case enjoys the luxury of not having to meet the burden of proof in order to prevail, he is saddled with a significant disadvantage with regard to the alignment of opening and closing statements. The party with the burden of proof generally opens first and closes last.

Whether in state or federal court, it is often thought that he who has the last word in summation has an edge over his adversary.

No Rebuttal Opportunity

It goes without question that in State Supreme Court in New York there is no opportunity for rebuttal during summation. The defense attorney is placed at a distinct disadvantage. Namely, there is no opportunity to respond to the plaintiff's arguments after he sums up. Defense counsel is faced with the problem of trying to anticipate and neutralize his adversary's closing before it takes place.

A clever argument often made by defense attorneys meets this fear head on. This tactic seeks to have the jurors place themselves in the position of defense counsel and answer the questions and issues that will be raised in summation by the plaintiff's lawyer.

The following illustrations suggest a few methods of dealing with this concern:

Now ladies and gentlemen, I am about to sit down and when I do Mr. (Plaintiff's Attorney) is going to stand up and he is going to talk to you. He is a very good lawyer and he is going to tell you a lot of things. And I don't get to talk next. I don't get to respond. And I assure you I have an answer for every one of the things that he is going to tell you that will sound so compelling and so convincing.

Since I don't have a chance to stand up next and answer his comments and arguments, what I ask you to do as he talks to you is this: put yourself in my shoes and just imagine what would I be saying to each of these comments and how would I answer his arguments. And if you will do that, I am sure we can reach a just verdict in this case. If you don't do that however, justice cannot be done.

An abbreviated version of the same argument addresses the point:

Now, this will be my first and last chance to talk to you. Once I sit down, I'm through. I can't answer the plaintiff's lawyer. No matter what he says about my client, the proof, or even me, I can't answer. So I hope that if you feel it fair in your mind, that you will answer it for me.

Some defense attorneys even try to subtly suggest that it is unfair that they are forced to speak first during summation:

As you can see, I speak first during final argument. I assure you it is not a matter of choice for I would rather have the advantage of summing up last. I realize that my adversary may raise some points that I do not raise and he may raise new points that I am not permitted to answer. I am going to ask you to be my lawyer when you go into the jury room to deliberate. I am going to ask you to consider the issues carefully. And I am going to ask you to answer my adversary for me when I can no longer speak.

The 'Golden Rule'

These arguments by the defense attorneys are clever indeed. They attempt to accomplish indirectly that which is clearly prohibited directly by the so-called 'Golden Rule,' which prohibits attorneys from asking jurors to place themselves in the shoes of the parties. In this instance, of course, the defense lawyer is beseeching the jury to assume the role of advocate on behalf of his client. While some plaintiff's attorneys might object to these arguments, which should be sustained, a more successful approach to dealing with and responding to this ploy is to explain and reveal this tactic for what it really is during the plaintiff's summation.

What (Mr. Defense Attorney) asked you to do was very clever on his part. It is very smart if you think about it. Instead of having you remain unbiased and in your own shoes, viewing what the attorneys say independently or impartially, he asks you to sit there, not as though you were an independent juror, but as though you were counsel for the defense listening to me. As though you were my adversary. And he wants you to place yourself in that position. I want to tell you right now, that's his job--that's not your job. Your job is to listen to him neutrally and to listen to me neutrally and to decide the facts fairly. No matter what the defense attorney tries to tell you, the only way justice can actually be accomplished is if you remain faithful to your role.

Another tactic often employed by defense attorneys who know that there is no opportunity for rebuttal is to try to predict what the plaintiff's attorney might say in his summation. The thought or hope is that by bringing out the most damaging argument during the defense summation it will somehow lessen its impact when made by the plaintiff's lawyer.

Imagine, for example, the following scenario: A medical malpractice case has been brought in which the plaintiff suffered severe bed sores resulting in the destruction of bone due to infection. Although the doctor's orders reflect that the patient should have been turned and repositioned every two hours (in keeping with the standard of care) the nurse's notes do not reflect such turning and repositioning.

Anticipating a Summation

Here, the defense attorney's summation might try to anticipate the plaintiff's summation:

Ladies and gentlemen, I fully anticipate that the plaintiff's attorney will attempt to focus your attention on the nursing notes. Clearly, the notes do not reflect the fact that the patient was turned and repositioned every two hours. But the nurses testified that the patient was turned and repositioned in keeping with the doctor's orders. The mere fact that a notation wasn't made is insignificant. The note is not what's important, no matter what the plaintiff's lawyer tells you. The care is what is important. And the care that was given was in full compliance with the doctor's orders.

Instead of jumping into an argument on this very point, the plaintiff's attorney should take the opportunity to point out what the defense attorney has done and then respond accordingly. [FN1]

Ladies and gentlemen, the defense attorney has tried to predict my arguments. I will tell you right now, he has predicted them. But just because he has predicted them doesn't detract from them. All this means is that (the defense attorney) is a clever and astute lawyer who can predict a reasonable and compelling argument when he hears one. Ask yourself this question: If the patient was truly turned and repositioned every two hours, why isn't there a nursing note to that effect? Because it wasn't done. Why were the bedsores so severe? Because the patient wasn't turned. Why are these types of notes kept in the first place? To reflect the care that was given and to reflect what truly happened to this patient.

While the attorney with the burden of proof enjoys the advantage of summing up last, the savvy practitioner must give consideration on how best to press that advantage. Specifically, while getting the last word affords the attorney an opportunity to respond to the arguments raised in an adversary's summation, it is easy for a lawyer to get lost in answering his opponent's arguments- and overlooking his own. Particularly in cases, as frequently occurs, in which the court imposes time limits on summation, it is increasingly vital that the attorney summing up last remembers to present the points he believes are most important to the jury.

The challenge for a plaintiff's attorney is well-illustrated by the following example: Assume you represent a person injured in a two-car collision. You believe your liability case is strong, and that the plaintiff undeniably sustained serious injuries, which debilitated him for a significant period of time. Unfortunately, one problem exists: the defendants used a surveillance video, which was shown to the jury, that establishes your client was able do things which he claimed at his deposition that he could not. To make matters worse, the tape depicts him playing basketball, when he's testified at deposition that his pain prevents him from performing even simple everyday tasks.

Naturally, your adversary has made this tape the central point of his summation. He has challenged you to explain why a person who misrepresented his condition for the purpose of tricking a jury into believing that he was injured worse than, in reality, he was, should be believed about anything or receive any compensation.

Issue Selection

Here, issue selection becomes critical. While one might feel compelled to analyze the tape in excruciating detail on the plaintiff's summation in order to minimize the defendant's claims regarding its impact, the wiser course is to focus on your strongest arguments, perhaps even minimizing the significance of the tape in the process:

Two witnesses came in here and told you how the defendant sped through a red light, never slowing down, never seeing what was there to be seen, never taking any reasonable action to avoid the accident. And what does his lawyer say about this? He says, look at the videotape of my client. No answer at all. You've seen the hospital records, and the X-rays of my client's broken bones, and heard doctors tell you about the impact these injuries have had on (the plaintiff), and the toll they will take on his body for the rest of his life.

What's his answer? One day, they caught him doing his best to enjoy his life, and trying to play some basketball. Does that make the documented pain and suffering my client sustained any less real? Of course not.

Why did he spend 90 percent of his summation talking to you about that tape? You all know why. Because he can't justify his client's conduct, and he certainly can't dispute that my client was severely injured, so he tries to divert your attention away from all of the facts, all of the witnesses, all of medical reports, all the days my client can never get back, and get you to focus on one moment in time, a window into that one day, when he was feeling a little better, hoping you'll ignore those days of documented pain, of pure suffering.

If you let him succeed in distracting you from the real issues at hand, that's not justice.

Conclusion

Like most facets of trial work, the relative advantages or disadvantages attendant to order of summation are what you make of them. While defense counsel has the opportunity to mitigate the problem of speaking first by asking the jury to 'fill in' for him with its own rebuttal, plaintiff's counsel still must make use of his advantage in speaking last by stressing his most important winning arguments, which he hopes will carry the jury through their deliberations.

FN1. Patrick L. McCloskey and Ronald L. Schoenberg, Criminal Law Deskbook §19.04 (1984)